Filed 12/28/09 P. v. Barnette CA1/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL CRAIG BARNETTE, Defendant and Appellant.	A122229 (Alameda County Super. Ct. No. 154597A)

Defendant was convicted of two counts of assault with a deadly weapon on evidence that, on two successive days, he used a skateboard to batter the same victim. Defendant contends the trial court erroneously denied his *Marsden*[1] motion, improperly denied him the right to retain counsel of his choice, failed to fulfill its sua sponte duty to instruct on a lesser included offense, and erred in continuing to conduct the trial after he stopped attending. We find no error and affirm.

I. BACKGROUND

Under the name Mark Allen Broome, defendant was charged in an information with two counts of assault with a deadly weapon, the assaults occurring on January 15 and 16, 2007.[2] (Pen. Code, § 245, subd. (a)(1).) As an enhancement to the second count, the information alleged defendant personally inflicted great bodily injury on the victim.

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[1] *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

[2] Defendant was referred to throughout trial by all participants, including his attorney, as Mark Broome. He now asserts his true name is Michael Barnette, without providing an explanation for the apparent alias.

(Pen. Code, § 12022.7, subd. (a).) Also charged was a codefendant, Andrea Schiefer, whose convictions we affirmed in a prior decision. (*People v. Schiefer* (Feb. 3, 2009, A120297) [nonpub. opn.].)

The matter was scheduled for trial on October 1, 2007. On that day, the prosecution's request for a weeklong continuance was denied. The next afternoon, defendant informed the court that he was dissatisfied with his appointed attorney, James Ramsaur. The court construed the complaint as a request for substitute appointed counsel and held a closed hearing pursuant to *Marsden, supra*, 2 Cal.3d 118. During the hearing, defendant explained that Ramsaur would not express his opinion regarding the strength of defendant's case, did not communicate with defendant, and had done little to prepare the case. In particular, Ramsaur had not yet read the preliminary hearing transcript on the day prior to trial. In addition, defendant contended Ramsaur refused to call a favorable witness. He told the court that Ramsaur's private investigator had spoken to the witness, who claimed to have seen the entire incident and "was horrified" that defendant had been arrested. When defendant asked Ramsaur why he did not intend to use the witness, Ramsaur refused to explain, saying, "I can't tell you that."

Given the opportunity to respond, Ramsaur said he had 28 years of experience practicing criminal law in California and had been representing defendant for about one year. Answering defendant's charges, Ramsaur said he had not only read the preliminary hearing transcript but also had participated in the hearing itself. He acknowledged difficulty in contacting defendant, but he attributed it to defendant's living in Ukiah and maintaining several phone numbers. Regarding the purportedly favorable witness who had been interviewed by his investigator, Ramsaur expressed skepticism because the witness's version of events did not match up with those of other witnesses and the witness had not come forward during the police investigation. As a result, Ramsaur had concluded that the witness's testimony was "incomplete, false and incorrect." Ramsaur implied he believed the witness's testimony could have been influenced by defendant and Schiefer. Although defendant had requested a copy of the investigator's report regarding his interview with the witness, Ramsaur had concluded "there was no point in providing"

it to defendant because the testimony was false and the report "may be passed on" to Schiefer. Ramsaur told the court defendant's dissatisfaction arose only very recently when he received a disappointing plea offer from the prosecution.

The trial court denied defendant's *Marsden* motion, finding there had been no breakdown in the relationship between defendant and Ramsaur that would make it impossible for Ramsaur to represent defendant effectively. When he learned of the court's ruling, defendant asked the court, "So how can I get a new lawyer?" The court responded defendant was "not getting one," even if he retained counsel himself. As the court said, "on the doorstep of us picking a jury tomorrow morning, there won't be any new lawyer."

Although defendant attended the first two days of jury selection, October 3 and 4, 2007, he failed to appear on the next day of trial, October 9. Defendant's bail was forfeited, a bench warrant was issued, and the trial continued in his absence. He did not return for the duration of the trial.

Kenneth Johnson, Schiefer's husband at the time of the incidents, was the primary prosecution witness. Johnson testified that in early 2007, he was living in Berkeley with Schiefer. Schiefer stayed away from the house for two nights and returned early in the morning of January 15 with defendant. Schiefer asked Johnson whether defendant could stay in their home for a brief period. Although Johnson initially acceded to her request, he and defendant soon got into an argument, and Johnson asked defendant to leave. After some resistance, defendant walked out the door. Over Johnson's objections, Schiefer packed her things and began to leave as well. When she opened the door to leave, defendant was standing outside the door. When he saw Johnson standing alongside Schiefer in the door, defendant "took his skateboard and hit me in the head with it, brought it down on my head. He had it gripped in both hands. . . . He was hitting me on the head . . . with the edge of the skateboard like as if you would swing an axe. . . . And he was using the narrow edge, and it was striking me on top of the head and the temples." The four blows caused lacerations and ruptured blood vessels in Johnson's eye. Johnson

returned inside the house, and Schiefer and defendant left. The next day, defendant committed a similar but more savage skateboard assault that seriously injured Johnson.[3]

Schiefer, the only other witness to the January 15 assault, also testified. According to Schiefer, she returned home with defendant that morning. Johnson and defendant soon began to argue, and Johnson insisted to Schiefer that she "throw [defendant] out." When Schiefer refused, Johnson lunged to hit defendant, and defendant fought back. Their fistfight carried them through a door, out of Schiefer's sight. Then defendant ran out the door, pursued by Johnson, who was holding a foot-long knife that belonged to Schiefer. After the two ran into a small dining room, Johnson raised the knife above his head and stabbed at defendant. Defendant, who had grabbed his skateboard, used it to block the knife. As Johnson pulled the knife from the skateboard, defendant ran for the door. Schiefer wrestled unsuccessfully with Johnson for the knife before grabbing some possessions to leave with defendant. As she tried to leave, Johnson blocked her way out, holding a screen door closed. They struggled over the door, and defendant, standing outside, struck Johnson's hands with the skateboard to cause him to release the door. Schiefer and defendant then left together.

Defendant was convicted in absentia of both counts, and the jury found true the allegation that defendant personally inflicted great bodily injury. After being detained on the warrant, defendant was represented by new counsel. The trial court sentenced him to six years in state prison, imposing a three-year term on one count of assault with a deadly weapon, enhanced by a consecutive three-year term for infliction of great bodily injury. The court imposed a three-year concurrent sentence on the other assault conviction.

II. DISCUSSION

Defendant contends the trial court (1) erroneously denied his *Marsden* motion and improperly precluded him from retaining new counsel; (2) failed to instruct on the lesser

[3] Because the details of this assault are not material to the issues raised by defendant on appeal, we do not include them. The events are described in our decision affirming Schiefer's convictions. (*People v. Schiefer, supra,* A120297.)

included offense of simple assault on the first count, charging the January 15 assault; and (3) erred in trying defendant in absentia.

A. *The* Marsden *Motion*

Defendant contends the trial court erred in denying his *Marsden* motion because Ramsaur's performance was deficient and there was an irreconcilable conflict between defendant and Ramsaur.

" '[A] *Marsden* hearing is not a full-blown adversarial proceeding, but an informal hearing in which the court ascertains the nature of the defendant's allegations regarding the defects in counsel's representation and decides whether the allegations have sufficient substance to warrant counsel's replacement.' " (*People v. Gutierrez* (2009) 45 Cal.4th 789, 803.) " 'A defendant "may be entitled to an order substituting appointed counsel if he shows that, in its absence, his Sixth Amendment right to the assistance of counsel would be denied or substantially impaired." [Citation.] The law governing a *Marsden* motion "is well settled. . . . A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result." ' " (*People v. Jackson* (2009) 45 Cal.4th 662, 682.) The trial court's decision following a *Marsden* hearing is reviewed for abuse of discretion. (*People v. Memro* (1995) 11 Cal.4th 786, 857.)

We find no abuse of discretion in the trial court's denial of defendant's *Marsden* motion. Defendant was dissatisfied with Ramsaur because, purportedly, he did not express his opinion regarding the strength of defendant's case, did not communicate with defendant, had done little to prepare the case, in particular having failed to read the preliminary hearing transcript on the day prior to trial, and refused to call a purportedly favorable witness. Ramsaur satisfactorily answered these charges. He explained it was not his practice to opine on the likelihood of a client's conviction and contended he had attempted to stay in contact with defendant but was frustrated by defendant's transient lifestyle. He told the court he had not only read the preliminary hearing transcript, but also had participated in the hearing. Finally, he explained he decided not to call the

witness because he judged the witness's testimony not credible and possibly fabricated. Accepting these explanations, as the trial court was entitled to do, there was no reason to believe either that Ramsaur's representation was deficient or that he and defendant had a conflict that would make effective representation difficult.

Defendant contends Ramsaur's performance fell short because defendant had a right to see a report of the interview Ramsaur's investigator did with the witness and to learn from Ramsaur why he did not intend to call the witness. The only authority defendant cites for his contention that he had a right to the report and Ramsaur's explanation is *Michigan v. Harvey* (1990) 494 U.S. 344, which holds only that a defendant has the general right to consult counsel. (*Id.* at p. 348.) That, of course, is a far cry from holding that a defendant has a right to view the work product generated by his counsel and to receive an explanation for all tactical decisions. It is commonly held that " '[a] defendant does not have the right to present a defense of his own choosing, but merely the right to an adequate and competent defense. [Citation.] Tactical disagreements between the defendant and his attorney do not by themselves constitute an "irreconcilable conflict." ". . . [C]ounsel is 'captain of the ship' and can make all but a few fundamental decisions for the defendant." ' " (*People v. Jackson*, *supra*, 45 Cal.4th at p. 688; see similarly *People v. Alfaro* (2007) 41 Cal.4th 1277, 1302.) The type of disclosures and discussion defendant urges are not constitutionally required, and an attorney may have practical or even ethical reasons for failing to disclose or consult, as Ramsaur believed here. In any event, Ramsaur violated no right of defendant, and his conduct constituted neither inadequate assistance nor an irreconcilable conflict.

Defendant contends that because of the failure to disclose the investigator's report, his situation was "essentially the same as that in *People v. Harvey* (1984) 151 Cal.App.3d 660." In *Harvey*, the court reversed the trial court's refusal to permit a defendant to withdraw her plea of guilty to second degree murder. The reversal occurred because the defendant's attorney had not informed her prior to the plea that a psychiatrist hired by the defense had formed the opinion that the defendant, at the time of the killing, was incapable of the mental state required for the crime to which she pleaded guilty. (*Id.* at

p. 668.) As a result, the court concluded, the plea was not knowing and intelligent. (*Id.* at pp. 670–671.) Contrary to defendant's argument, Ramsaur's failure to provide the report did not deprive him of information critical to his defense. Unlike the defendant in *Harvey*, defendant was already aware of the general nature of the witness's testimony. Nor is there any reason to believe Ramsaur's conduct with respect to this witness contributed to defendant's decision to reject the prosecution's plea offer, an offer defendant contends "should have been taken." Given defendant's awareness that Ramsaur did not intend to call the witness, there is no reason to believe defendant rejected the plea offer on the strength of this witness's potential testimony.[4] *Harvey* thus differs from this situation in two critical respects: defendant was not ignorant of material information, and he made no critical decisions that would have been affected by the absence of information.

Defendant criticizes Ramsaur's decision not to call the witness because, he contends, Ramsaur had no basis for his apparent belief that defendant and Schiefer had coached his testimony. In fact, the primary basis for Ramsaur's decision was not his concern about tampering but the discrepancy between the testimony of this witness and that of the other witnesses, which caused Ramsaur to conclude the testimony was not credible. This was a rational tactical decision and provides no basis for concluding Ramsaur's representation was ineffective.

Defendant also cites what he claims were "bizarre" comments by Ramsaur during the hearing. While we acknowledge that these truncated comments, which were intended to convey defendant's insensitivity to his parents' divorce, seem odd in context, they do not illustrate either an irreconcilable conflict or incompetent representation.[5]

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[4] Because there is no explanation for defendant's decision in the record, assigning any cause is sheer speculation.

[5] Defendant also criticizes Ramsaur's comment that "six years of state prison is the possible downside" when discussing the plea offer. Defendant contends Ramsaur should have known eight years was the statutory maximum for his crimes. In context, Ramsaur's comment might have been intended to state a likely sentence, rather than the

B. ***Denial of Retained Counsel***

Defendant contends the trial court denied him counsel of his choosing, based on the following colloquy, which occurred after the trial court denied defendant's *Marsden* motion:

"THE DEFENDANT: So how can I get a new lawyer?

"THE COURT: You're not getting one.

"THE DEFENDANT: If I hire one?

"THE COURT: No. You are not hiring anybody. He is your lawyer for this case. He is your lawyer for this case. [¶] I am denying it. I have found that his representation has been effective and that he will continue to effectively represent you. [¶] So on the doorstep of us picking a jury tomorrow morning, there won't be any new lawyer. He is going to be your lawyer for this trial."

While it is generally true that a defendant has the right to counsel of his or her choosing, that right is not absolute. Most notably, an indigent defendant relying on court-appointed counsel has no say in the selection of counsel. Absent circumstances satisfying the *Marsden* requirements, an indigent defendant must accept the counsel assigned. (*People v. Ortiz* (1990) 51 Cal.3d 975, 984.) Even a defendant who can afford to retain counsel may be refused a request to change counsel if the change would be unduly disruptive. While "a defendant . . . who seeks in a timely manner to discharge retained counsel, ordinarily should be permitted to do so," such discharge may be denied if "it will result in 'significant prejudice' to the defendant or in a 'disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.' " (*Id.* at pp. 981, 982.) "[T]he court should 'balance the defendant's interest in new counsel against the disruption, if any, flowing from the substitution.' [Citation.] In so doing, the court 'must exercise its discretion reasonably: "a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend

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statutory maximum sentence. There is no evidence to support the implicit claim Ramsaur failed to inform defendant about the consequences of his decision to reject the plea offer.

with counsel an empty formality." ' " (*People v. Keshishian* (2008) 162 Cal.App.4th 425, 429.)

It is not clear which standard, the *Marsden* standard for substitution of appointed counsel or the more permissive standard for discharge of retained counsel, should be applied under these circumstances. Defendant, who relied on appointed counsel, was presumptively indigent, and the *Marsden* motion was undertaken on the assumption he was seeking to substitute one appointed counsel for another. When he contradicted this presumption by asking the court whether he could hire an attorney himself, he gave no indication that his situation had changed in a manner that would provide him the financial means to hire counsel. In the absence of a demonstration that defendant had the ability to retain counsel, and not just the desire, the trial court was entitled to view his request merely as a reiteration of his *Marsden* motion. As noted, that motion was properly denied. Further, there could not have been any prejudice in the trial court's denial of retained counsel if, in fact, defendant lacked the means to retain counsel.

We need not resolve the issue of which standard properly applies, however, because even under the standard for denial of a change of retained counsel, we would affirm. As noted, a request to discharge retained counsel may be denied if it would result in a " 'disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.' " (*People v. Ortiz, supra,* 51 Cal.3d at p. 982.) As a result, trial courts have generally been held to have the discretion to deny a motion to discharge retained counsel when the motion is made on the eve of trial and on grounds that could have been raised earlier, as here. In *People v. Keshishian*, *supra*, 162 Cal.App.4th 425, for example, the defendant asked to discharge his attorney because he had " 'lost confidence' " in him. The request was made on the day set for trial, after the matter had been pending for two and one-half years, and it would have required an "indefinite continuance" because the defendant "had neither identified nor retained new counsel." (*Ibid.*) Under these circumstances, the court held, trial court did not abuse its discretion in denying defendant's request to retain new counsel. So here, defendant's request was made on the day set for trial and would have required not only an indefinite continuance

of his trial but also that of Schiefer. Alternatively, the court could have severed their trials, a step that would have doubled the burden to the witnesses and the criminal justice system. (Cf. *People v. Courts* (1985) 37 Cal.3d 784, 791 [concluding a defendant who had begun searching for counsel two months before trial was not " 'unjustifiably dilatory' "].) In these circumstances, the trial court did not violate defendant's right to counsel of his choice by denying as untimely his request to retain an attorney.

Defendant relies on *People v. Lara* (2001) 86 Cal.App.4th 139, in which the trial court was held to have erroneously applied the *Marsden* standard to a defendant's request to discharge his retained counsel. Because the trial court did not address the discretionary factors that are properly applied to a motion to discharge retained counsel, discussed above, the Court of Appeal reversed. (*Lara*, at pp. 164, 166.) Even assuming defendant's situation should be evaluated under the standard applicable to a request to discharge retained counsel, *Lara* does not require reversal. Notably, although the *Lara* defendant's motion to discharge was made on the eve of trial, the court noted that the defendant could not have made the motion earlier because he was unaware earlier of the factors that led to the request to discharge. (*Id.* at pp. 162–163.) In contrast, defendant's stated grounds for dissatisfaction had been present for some time. Further, the *Lara* court did not hold that denial under the circumstances presented there would constitute an abuse of discretion; it merely remanded for consideration under the proper standard. Here, the trial court expressly noted that it was denying defendant's request to find retained counsel because it was untimely. As noted above, we find this to have been a proper exercise of the trial court's discretion.

C. *Lesser Included Offense*

Defendant contends the trial court erred in failing to instruct on the lesser included offense of simple assault in connection with the first count, which charged assault with a deadly weapon in connection with the January 15 attack at Johnson and Schiefer's home.

" 'California law has long provided that even absent a request, and over any party's objection, a trial court must instruct a criminal jury on any lesser offense 'necessarily included' in the charged offense, if there is substantial evidence that only the

lesser crime was committed. This venerable instructional rule ensures that the jury may consider all supportable crimes necessarily included within the charge itself, thus encouraging the most accurate verdict permitted by the pleadings and the evidence.' [Citation.] . . . The duty extends to every lesser included offense supported by substantial evidence; it is *not* satisfied 'when the court instructs [solely] on the theory of that offense most consistent with the evidence and the line of defense pursued at trial.' " (*People v. Anderson* (2006) 141 Cal.App.4th 430, 442.) Substantial evidence is evidence sufficient to deserve consideration by the jury, that is, evidence that a reasonable jury could find persuasive. (*Id.* at p. 446.)

The sua sponte duty to instruct never arose here because there was no substantial evidence that only simple assault, but not assault with a deadly weapon, occurred. Two witnesses, Johnson and Schiefer, testified with respect to the assault on January 15. Johnson described an unprovoked assault with a skateboard, wielded in a potentially lethal manner. Schiefer described no assault at all. In her account, defendant struck blows only in defending himself or Schiefer against Johnson. If, as apparently happened, the jury rejected Schiefer's testimony and concluded defendant did not act in self-defense, there was no testimony from which the jury could have concluded that only a simple assault, rather than assault with a deadly weapon, occurred.

The situation is essentially identical to that of *People v. McDaniel* (2008) 159 Cal.App.4th 736, in which a prison inmate who suffered a broken knuckle during a fight with a second inmate was convicted of aggravated assault. The defendant, who testified he had acted in self-defense, contended on appeal that the trial court erred in failing to instruct on the lesser included offense of simple assault. (*Id.* at pp. 740–741.) In finding no error, the court reasoned, "We do not find that the evidence warranted instructions on simple assault. If, as the jury implicitly here found, defendant did not act in self-defense, then the undisputed evidence introduced at defendant's trial showed no less than an assault with force likely to produce great bodily injury. Simply put, defendant hit [the other prisoner] with enough force to suffer great bodily injury himself: a fractured knuckle. Accordingly, we do not find that a jury could reasonably conclude

that that force applied to [the other prisoner's] face and head was not likely to cause him to also suffer great bodily injury." (*Id.* at p. 749.) So here, after the jury rejected Schiefer's testimony, it could not reasonably have concluded that defendant assaulted Johnson in any way other than with a deadly weapon, given the nature of Johnson's testimony.

Defendant argues the jury could have concluded he merely struck Johnson with the skateboard on his hands to cause him to release the door. This, too, would have been justifiable conduct, rather than the crime of assault, because defendant was attempting to come to the aid of another by resisting Johnson's forceful detention of Schiefer. (Pen. Code, § 692, subd. (2); *People v. Watie* (2002) 100 Cal.App.4th 866, 880.) It therefore provided no basis for a conviction on simple assault.

D. *Defendant's Conviction in Absentia*

Defendant argues that the trial court erred in proceeding in his absence after he failed to appear for trial following the first two days of jury selection.

Under Penal Code section 1043, subdivision (b)(2), trial may be conducted in the defendant's absence if the absence is voluntary and the defendant was present when trial "commenced."[6] Defendant urges us to follow *People v. Molina* (1976) 55 Cal.App.3d 173 (*Molina*), which held that trial does not "commence" for purposes of section 1043 until after the jury has been selected. (*Id.* at pp. 176–177.)

As defendant acknowledges, the ruling of *Molina* was rejected in *People v. Granderson* (1998) 67 Cal.App.4th 703. As *Granderson* explained, construing Penal Code section 1043 to delay "commencement" of the trial until after the jury is sworn would be inconsistent with the goals of the statute and would conflict with federal practice under the similar rule 43 of the Federal Rules of Criminal Procedure. Accordingly, *Granderson* held that trial commences under section 1043 with the beginning of jury selection. (*Granderson*, at pp. 708–711). *Granderson*'s discussion has been summarized with apparent approval by the Supreme Court in *People v. Concepcion*

[6] Defendant does not contend his absence was involuntary.

(2008) 45 Cal.4th 77, 83–84, and the holding of *Molina* was rejected as well by *People v. Ruiz* (2001) 92 Cal.App.4th 162, 168–169. We find *Granderson* persuasive and decline to follow *Molina*. Because trial "commenced" for purposes of section 1043 with the start of jury selection, the trial court committed no error in continuing the trial in defendant's absence.

III. DISPOSITION

The judgment of the trial court is affirmed.

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Margulies, J.

We concur:

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Marchiano, P.J.

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Dondero, J.